IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC. d/b/a WRS MOTION PICTURE LABORATORIES, a corporation, Plaintiff, vs. PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, CHARLES VON BERNUTH and JOHN HERKLOTZ, Defendants.	)	Civil Action No. 00-2041

BRIEF IN SUPPORT OF DEFENANT JOHN HERKLOTZ'S MOTION TO OPEN JUDGMENT PURSUANT TO RULE 60(b)

AND NOW, comes Defendant, John Herklotz ("Herklotz"), by and through his attorneys, BURNS, WHITE & HICKTON, LLC, and hereby requests relief from the Order granted by the Honorable Arthur J. Schwab on February 20, 2007 entering judgment against Herklotz and in favor of Plaintiff, WRS, Inc. ("WRS") in the amount of $2,584,749.03. In support of Herklotz's Motion for Reconsideration or Relief from Judgment Pursuant to Rule 60, Herklotz avers as follows:

I. Defendant Herklotz Requests Immediate Relief from This Court As a Result of Newly Discovered Evidence Uncovered on the Eve of its Schedule Argument Before the Third Circuit.

The Honorable Arthur J. Schwab issued a final Order entering judgment against Defendant John Herklotz in the amount of $2,491,981.03 and $92,768.00. On the same day the court entered default judgments against Plaza and co-Defendants Charles Von Bernuth ("Von Bernuth") and Eric Parkinson ("Parkinson"). The court then severed and transferred additional cross-claims brought against two co-defendants, thereby creating a final, appealable order.

(Document 141). As a result, Herklotz sought timely review with the United States Court of Appeals for the Third Circuit, and that appeal is pending. On March 13, 2008, the Honorable Judge Standish issued an Order granting the motions of Von Bernuth, Parkinson and Plaza for relief from default judgment pursuant to Fed.R.Civ.P. 60(b). (Document 194). After reviewing the documents on record in this Court, Herklotz has determined that this new evidence directly impacts the award against him. Out of fundamental fairness and judicial consistency, Herklotz requests that this Honorable Court open the judgment Judge Schwab entered against him on February 20, 2007 as well. Further, Herklotz requests that this Motion be considered on an emergency basis due to the fact that the Third Circuit oral argument is likely to occur on or about June 6, 2008.

II. **Background**

Plaintiff WRS brought this action against Herklotz seeking to hold him liable under a surety agreement signed by Herklotz on May 6, 1998. The allegations in this litigation arose from Herklotz's status as a surety relative to the business relationship between WRS and Plaza Entertainment, Inc. ("Plaza"). Plaza executed a Credit Application in 1998, so that WRS would reproduce films and videos for Plaza on a credit basis. When Plaza failed to pay its obligations in connection with this business relationship, WRS claimed that Herklotz, from whom WRS obtained the surety agreement referred to above, was liable for the debts of Plaza. Herklotz denied the allegations, claiming that the subsequent suretyship agreement signed May 6, 1998 was discharged upon the execution by WRS and Plaza of an agreement denominated as a "Services Agreement" on October 12, 1998. The Services Agreement materially modified the creditor-debtor relationship between WRS and Plaza and subsequently increased Herklotz's risk, thus discharging him of his obligation, since he had no knowledge of the Services Agreement at the time of its execution.

Following the filing of cross Motions for Summary Judgment by WRS and Herklotz, the Honorable Arthur J. Schwab issued a decision on the issue of Herklotz's liability, holding that Herklotz, as a compensated surety, was obligated to WRS for the debt of Plaza to pay under the surety agreement signed May 6, 1998.

On February 20, 2007, Judge Schwab issued a final Order based upon WRS's Motion for Summary Judgment as to Damages, entering a judgment against Herklotz in the amount of $2,491,981.03 and $92,768.00. On the same day the court entered default judgments against Plaza and co-defendants Charles Von Bernuth and Eric Parkinson. The court then severed and transferred additional cross-claims brought against two co-defendants, thereby creating a final, appealable order. (Document 141). Herklotz sought timely review with the United States Court of Appeals for the Third Circuit, and that appeal is pending.

On October 16, 2007, in the above-captioned case, Defendant Von Bernuth filed a Motion for Reconsideration or Relief from Judgment. Prior to that time, Von Bernuth, along with co-Defendants Parkinson and Plaza, was represented by John W. Gibson, Esquire. Von Bernuth's motion was based on the failure of Attorney Gibson to properly and diligently represent him in this case which resulted in the entry of the default judgment. In sum, Von Bernuth asserted that Attorney Gibson was "repeatedly and inexcusably derelict in his nonperformance of his professional duties." (Document 151, pg. 3). Attorney Gibson acknowledged in an accompanying affidavit that he had no excuse for failing to properly defend his clients and for failing to keep them informed and advised. As noted, similar judgments were assessed against Defendants Parkinson and Plaza on the same date.

In support of his request for relief, and also key to this Motion, Von Bernuth also set forth facts which show that meritorious defenses exist to WRS's claim against co-Defendants, but also notably to WRS's claim against Defendant Herklotz. These facts were drawn primarily from the Affidavit of Parkinson and documents attached thereto (Documents 154 and 155). Von Bernuth summarized these facts as follows:

- There were problems with WRS' performance under the Services Agreement virtually from the inception of the arrangement.
- WRS never accounted to Plaza or credited its account with money derived from Plaza's accounts receivable.
- Although WRS claimed that "no collections had been received into the lock box account," Plaza's customers were in fact making payments on Plaza receivables in 1999 and 2000.
- In breach of the Agreement, Plaza received nothing from these payments, and they are not on the list of lock box payments produced by WRS.
- WRS failed to disclose or provide any records for a Mellon lock box account established in June 1999 to replace the original one.
- At the time of implementation of the second lock box, Plaza had approximately $1,045,180 in accounts receivable for collection.
- Plaza has received no payments from the $1 million plus in receivables.
- Computer errors caused WRS to generate invoices for services that either were not provided or were provided without authorization.
- WRS had possession of Plaza inventory having a wholesale value of approximately $700,000.00 for which WRS has not accounted.

(Document 151, pg. 4; see also Documents 154 and 155). These facts not only call into question the liability and damages of Von Bernuth, Parkinson and Plaza, but these facts also corroborate the defense of Defendant Herklotz.

On January 25, 2008, Plaza and Parkinson filed motions for relief from the default judgments, also based upon the inadequate representation of Attorney Gibson. On March 13, 2008, Judge Standish granted the Rule 60(b) motions of Von Bernuth, Parkinson, and Plaza. (Document 194). Judge Standish found that the motions were made within a reasonable time after entry of the judgments against the Defendants; that granting the Rule 60(b) motions would not prejudice Plaintiff WRS; that Defendants Von Bernuth, Parkinson and Plaza established a potentially meritorious defense; and that the Defendants did not engage in willful or bad faith conduct. (See Document 193, pgs. 27-41).

Judge Standish notably opined that in support of the Rule 60(b) motions filed by the Defendants,

> evidence was submitted which, if presented at trial, may result in a substantial reduction in the amount of damages recoverable by WRS. For Example, (1) Exhibit D to Parkinson's affidavit consists of evidence of two payments totaling $21,833.90 by Anderson Merchandisers on its account with Plaza Entertainment during the period the lockbox arrangement was in place and these payments are not reflected in WRS's records; (2) Exhibit I to Parkinson's affidavit is a letter written by Parkinson to WRS on February 3, 2000 in which, among other things, he objects to invoices for duplication services allegedly performed by WRS without a purchase order or authorization from Plaza Entertainment; and (3) with respect to some payments on Plaza Entertainment's accounts receivable that were recorded by WRS, evidence was submitted in support of the Rule 60(b) motions which shows that Plaza Entertainment was given credit against its outstanding balance for only 50% of payments, despite the fact that WRS kept 100% of the payments. Under the circumstances, Plaza Entertainment, Parkinson and Von Bernuth have met their burden of showing a meritorious defense with the level of specificity required to set aside a default judgment.

(See Document 193). The evidence proffered by Herklotz's co-Defendants, if presented at trial, will also result in a substantial reduction in the amount of damages recoverable by WRS as to Defendant Herklotz. The judgment against Defendant Herklotz is as a surety for Plaza. The current judgment holds Herklotz responsible every dollar of all of the co-Defendants' total amount of liability. If, as determined by Judge Standish, Plaza, Von

Bernuth and/or Parkinson could show that damages would be significantly reduced, the ultimate liability for Defendant Herklotz would also be significantly reduced.

When arguing against WRS's Motion for Summary Judgment as to damages, Herklotz posited, *inter alia*, that WRS's damages could not be reasonably calculated because proof of damages was muddled and confused due to poor record-keeping, failure to produce documentation, and its inability to produce documentation because records were never maintained in the first instance. In light of this, Herklotz argued at that time that the damages claimed by WRS against Herklotz could not be calculated to any degree of reasonable certainty.

The evidence elicited by Von Bernuth, Parkinson and Plaza corroborates the evidence set forth by Herklotz in his Motion for Summary Judgment.[1] It provides further basis for Herklotz's argument that WRS's damages cannot be calculated with reasonable certainty and that there is a genuine issue of material fact as to those damages. If proven at trial, the evidence brought forth by Herklotz's co-Defendants will reduce Herklotz's potential damages. As a result, Defendant John Herklotz requests that this Honorable Court open the February 20, 2007 Judgment entered against him.

The Herklotz Appeal

After the default judgments were entered in favor of WRS and against Plaza, Parkinson and Von Bernuth, Judge Schwab directed counsel for WRS and Herklotz to appear at a conference on February 27, 2007 regarding Herklotz's pending motion to transfer venue pursuant to 28 U.S.C. § 1404(a). At this time, Judge Schwab believed the only remaining claims in the case to be adjudicated were the crossclaims asserted by Herklotz against his co-Defendants. Following the conference, Judge Schwab entered an order (1) granting an oral motion by Attorney John Sieminski to sever Herkltoz's crossclaims against Plaza Entertainment, Von Bernuth and Parkinson from the other claims in the case, and (2) granting Herklotz's motion to transfer venue to the United States District Court for the Central District of California with respect to the crossclaims. Judge Standish addressed this in his March 13, 2008 Memorandum Opinion: "Based upon a reasonable belief that the judgment entered against him was a final judgment, Herklotz filed a Notice of Appeal the United States Court of Appeals for the Third Circuit on March 8, 2007." (Document 193, pg. 20).

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[1] Cross Motions for Summary Judgment were filed by WRS and Herklotz that were simultaneously considered by Judge Schwab on the issue of liability. The arguments made by Herklotz regarding damages were raised in his Motion for Summary Judgment filed February 24, 2006 (Document 81).

In light of the fact that the default judgments were opened by Judge Standish's March 13, 2008 Order, it is now clear that there are claims still to be adjudicated in this Court, and it is clear that the evidence elicited by Von Bernuth, Parkinson and Plaza calls into question the February 20, 2007 Order entering judgment against Herklotz. Even though Judge Standish entered Orders opening the default judgments, Herklotz filed a Motion for *Nunc Pro Tunc* Certification that the February 20, 2007 Order was a final, appealable order on March 27, 2008, in order for Herklotz to proceed with his oral argument in the event this Court does not provide him with the relief requested herein. Judge Standish granted Herklotz's Motion on March 31, 2008. Despite that motion, Herklotz asserts that the evidence brought forth by his co-Defendants warrants opening the February 20, 2007 judgment against him. Defendant Herklotz has also filed a request to stay his argument in the Third Circuit.

Expeditious resolution of this matter is critical, as the Third Circuit Clerk Marcia Waldron recently sent a letter to all counsel notifying them that the appeal has been tentatively listed on the merits for Friday, June 6, 2008 in Philadelphia, Pennsylvania. If the Court determines that there will be oral argument, it may occur on this date. All counsel will be notified within one (1) week prior to the disposition date (June 6, 2008) whether oral argument will be required, and on what date the oral argument will be scheduled.

Because the disposition date is drawing so near, it is necessary that this Honorable Court make a decision at its earliest possible convenience as to the February 20, 2007 Order entered against Defendant John Herklotz. It is in the interest of justice and judicial economy to avoid disposition of an appeal which is improperly docketed or that may confuse this Court's recent opening of the default judgments. Therefore, Defendant John Herklotz respectfully requests that this Honorable Court consider this Motion in a quick and expeditious manner and that it grant Herklotz's Rule 60(b) Motion to Open Judgment the February 20, 2007 Entry of Judgment against Defendant John Herklotz.

III. Argument

A. The February 20, 2007 Judgment Entered Against Defendant Herklotz Should be Opened because the Herklotz is a Mere Surety to Plaza's Debt to WRS, and His Liability Cannot be Greater Than That of WRS.

Defendant Herklotz, by virtue of the suretyship agreement he executed for Plaza's outstanding debt to WRS, cannot be held liable for more than the judgments entered against Plaza. This Court opened the default judgment against Plaza based upon the evidence presented by Plaza, Von Bernuth and Parkinson, which Judge Standish opined was potentially meritorious. In light of the opening of the judgment against Plaza, it stands that as a mere surety to Plaza's debt, Defendant Herklotz's alleged damages under the suretyship agreement cannot be determined, and the judgment against him must be opened.

It is axiomatic under Pennsylvania law that the liability of a surety is not greater than that of a principal and a judgment in favor of the principal. *Exton Drive-In, Inc. v. Home Indem. Co.*, 261 A.2d 319 (Pa. 1969); *Rafferty v. Klein*, 100 A. 945 (Pa. 1917), *cited by McShain v. Indemnity Ins. Co. of North America*, 12 A.2d 59,61 (Pa. 1940); *East Crossroads Center, Inc. v. Mellon-Stuart Co.*, 416 Pa. 229, 231 (1969). In *Exton Drive-In*, the court held that the speculative nature of damages alleged to have resulted from defendant-contractor's failure of timely performance rendered them unrecoverable. 261 A.2d at 325. As a result, the failure of performance did not give rise to liability on the part of the contractor. *Id.* Since the liability of the surety cannot be greater than that of its principal, the court similarly held that the surety did not have any liability under its performance bond due to the contractor's failure of timely performance. *Id.*

Because the judgment against Plaza has been opened, it follows that, as a mere surety to Plaza's debt, the judgment against Herklotz should be opened. As a result, Herklotz respectfully requests that this Honorable Court open the February 20, 2007 judgment entered against him.[2]

B. The February 20, 2007 Judgment Entered Against John Herklotz Should be Opened Because the Newly-Discovered Evidence Presented by Von Bernuth, Parkinson and Plaza Will Change the Outcome of the Judgment Against Herklotz.

Because the damages assessed against Herklotz pursuant to the February 20, 2007 Order are based entirely upon the damages allegedly incurred by Von Bernuth, Parkinson, and Plaza and merely guaranteed by Herklotz's suretyship agreement, the defenses recently elucidated by the other Defendants - and considered to be potentially meritorious by Judge Standish - indisputably affect the judgment entered against Herklotz. Just as the default judgments entered against Von Bernuth, Parkinson and Plaza were arguably premised upon erroneous figures, the summary judgment as to damages entered against Herklotz on the same date is premised upon the same erroneous figures. This evidence and these figures are new to this litigation, and consequently are new to Mr. Herklotz. Mr. Herklotz did not have the benefit of having this information during the stages of litigation leading up to Judge Schwab's summary judgment entered against him on February 20, 2007. This information corroborates Herklotz's argument on the unsubstantiated nature of the damages and creates a genuine issue of material fact as to WRS's damages calculations. The February 20, 2007 judgment should be opened in light of this newly-discovered evidence.

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[2] Pennsylvania law with respect to the liability of a guarantor is similar to the law regarding the liability of a surety. *Atalanta Corp. v. Ohio Valley Provision Co.*, 398 A.2d 183, 185 (Pa.Super. 1979).

Rule 60(b)(2) provides that "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial" can give rise to relief from a judgment or order. *Compass Technology v. Tseng Laboratories, Inc.*, 71 F.3d 1125, 1130 (3d Cir.1995); Fed.R.Civ.P. 60(b)(2). The standard for Rule 60(b)(2) relief requires that the new evidence (1) be material and not merely cumulative, (2) could not have been discovered before trial through the exercise of reasonable diligence and (3) would probably have changed the outcome of the trial. 71 F.3d at 1130, *citing Bohus v. Behloff*, 950 F.2d 919, 930 (3d Cir. 1991).

In *Compass Technology*, a manufacturer's representative, Compass, brought suit for commissions against the manufacturer, Tseng. 71 F.3d at 1127. The original agreement between the two parties provided for Compass's compensation. Compass contended that it was entitled to additional commissions for sales to Wang (co-defendant). *Id.* Tseng contended that there was an addendum to the agreement which stated that no such commissions were to be paid to Compass. *Id.* The United States District Court for the Eastern District of Pennsylvania awarded only one percent commission on sales in question (based on a later agreement between Compass and Tseng) and denied Compass's motion to open evidence that there was no agreement which stated that Compass was not entitled to commission on sales of products to Wang. *Id.* at 1128.

On appeal, the United States Court of Appeals for the Third Circuit stated that, "[n]o Addendum # 1 is in the record, and that has proved to be the focal point of the dispute between the parties. Even though Tseng was unable to produce a copy of any such addendum or to provide any witness who could testify to its claimed contents…it nonetheless says that there was such an animal and that the addendum specified that Compass was to receive no commission whatever on any sales of Tseng products to Wang." *Id.* at 1127. After the trial had ended, Compass was able to locate a witness that negated the evidence presented by Tseng – the witness controverted Tseng's witness's testimony as to discussions having taken place about Wang sales being noncommissionable and also negated the existence of Addendum # 1. *Id.* at 1128-29. Despite the location of new evidence, the District Court denied Compass's Rule 60(b)(2) motion, finding that Compass's new witness could have been located earlier had Compass exercised "reasonable diligence," that the witness's testimony would be "merely cumulative" and that the testimony would not change the outcome. The Court summarily refused to open the evidence to allow Compass's witness to testify. *Id.* at 1130.

However, the appeals court in *Compass Technology* found that Compass exercised "reasonable diligence" in trying to locate the witness prior to and up through trial; Compass's counsel took pursuit of several possible avenues to trace the witness's whereabouts. 71 F.3d at 1130. Further, the Court found that the testimony presented by the witness was not "merely cumulative." *Id.* The testimony the witness was to present was different from that of a prior Compass witness that the defendant argued presented the same information; the new witness had a different role than the existing witness, and the new witness came forth with different information that expressly contradicted the testimony of the defendant's key witness. *Id.* at

1130-31. Finally, the Court held that if a jury found the new witness's testimony credible, there could be a change in the outcome of the case. *Id.* at 1131.

Similar to the case in *Compass*, the Court here is faced with newly-discovered evidence that, if accepted by a fact finder, would change the outcome of the judgment assessed against Herklotz on February 20, 2007. The evidence here is completely new; it is not merely cumulative. The evidence cited above was within the knowledge of Eric Parkinson and Charles Von Bernuth, but not brought to the Court's attention as a result of those Defendants' counsel's errors. The evidence presented by Parkinson, Von Bernuth and Plaza provides additional and crucial information which calls into question the very basis for the monetary judgment assessed against Herklotz, who personally guaranteed the debt. Judge Standish, as previously noted, stated that if the calculations and evidence presented by Von Bernuth, Parkinson and Plaza were accepted, they could greatly reduce the amount of the judgments against those Defendants. The same is true in Herklotz's case. When such material information has the potential to clearly controvert the evidence used calculate Herklotz's damages, it cannot be considered cumulative.

This evidence could not have been obtained by Herklotz prior to the argument on Herklotz's and WRS's Motions for Summary Judgment. Herklotz suffered from the negligence of Attorney Gibson as well in this regard. Because Attorney Gibson failed to properly present the evidence within his clients' control, this evidence never came to light during the stages of litigation leading up to the judgments entered on February 20, 2007. Had Attorney Gibson diligently and properly represented his clients in this matter, this evidence would have been known to Herklotz, who would have been able to undertake further discovery in light of this information.

Finally, it cannot be denied that, if the evidence presented by Messrs. Von Bernuth and Parkinson, and Plaza Entertainment, is accepted by a fact finder, the outcome will most certainly be different, not only for Herklotz's co-Defendants, but for Herklotz as well. Such evidence clearly controverts the evidence presented by WRS as to damages calculations. Again, if WRS's calculations are deemed incorrect, the amount of all the Defendants' damages will be greatly reduced. It is in the interest of justice to have the judgment against Mr. Herklotz opened due to the strong potential that this newly-acquired evidence will at the very least diminish the extremely high monetary judgment assessed against him.

C. In the Alternative, the February 20, 2007 Judgment Entered Against John Herklotz Should be Opened Because of the Extraordinary Circumstances Presented by the Negligence of Attorney John W. Gibson.

Federal Rule of Civil Procedure 60(b) provides that "on motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding…" for five specific bases and "(6) any other reason that justifies relief." Fed.R.Civ.P. 60(b)(6). The general purpose of Rule 60 is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done. *Boughner v. Secretary of Health, Educ. & Welfare*, 572 F.2d 976, 977 (3d Cir. 1978), *citing* Wright and Miller, Federal Practice and Procedure § 2851. Rule 60(b)(6) provides an extraordinary remedy which may be invoked upon a showing of exceptional circumstances. *Boughner*, 572 F.2d at 977, *citing Ackerman v. United States*, 340 U.S. 193, 202 (1950). A party seeking relief must show that without relief, "extreme" and "unexpected" hardship will result. *Boughner*, 572 F.2d at 977, *citing United States v. Swift*, 286 U.S. 106, 119 (1932).

Here, the negligence of Attorney Gibson not only caused prejudice to his own clients; his negligence affected the outcome of WRS's case against Defendant Herklotz. The evidence submitted by Von Bernuth, Parkinson, and Plaza shows that there is error in the calculation of the damages assessed against them, which correspondingly shows that there is error in the calculation of damages assessed against Herklotz. If the Court does not take notice that the evidence elicited by Von Bernuth, Parkinson, and Plaza suffices to vacate the summary judgment against Herklotz, he will face extreme and unexpected hardship: being subject to a monetary judgment which may be far greater than the calculations against his co-Defendants ultimately dictates. The $2.5 million judgment as it stands against Herklotz, in his individual capacity as surety, has an extraordinarily substantial impact on his personal life and livelihood, and it would be extremely unjust given the newly discovered evidence that the judgment may be for an amount greater than that owed by Plaza.

In *Boughner,* the defendant filed motions for summary judgment and plaintiffs' counsel did not respond. 572 F.2d at 977. Plaintiffs argued that this was due to their counsel's (1) intense involvement in his campaign for the office of Common Pleas Judge of Northumberland County, Pennsylvania; (2) the loss of his secretary who allegedly was responsible for his calendar; and (3) his large backload of cases. *Id.* The trial court granted the defendant's motions unopposed and denied the plaintiffs' Rule 60(b)(1) and (6) motions. The Third Circuit Court of Appeals reversed, finding that the conduct of plaintiffs' attorney "indicates neglect so gross that it is inexcusable." *Id.*

As noted above, Judge Standish granted Von Bernuth, Parkinson and Plaza's Rule 60(b)(6) motions for the gross and inexcusable neglect of Attorney Gibson. Herklotz requests that this Honorable Court find that the neglect of Attorney Gibson created an extraordinary circumstance in which Herklotz, like his co-Defendants, was denied defenses that if proven will greatly reduce the amount of damages assessed against him based on his alleged liability on the personal suretyship agreement. Herklotz respectfully requests that this Honorable Court see the extraordinary circumstances Mr. Herklotz has been placed under, and what extreme and unexpected hardship he will face without being granted the relief he seeks.

III. CONCLUSION

As a result of the foregoing, Defendant John Herklotz respectfully requests that this Honorable Court vacate the judgment entered against him on February 20, 2007 and afford Mr. Herklotz the opportunity to defend his case in light of the new evidence brought forth by Defendants Charles Von Bernuth, or, in the alternative, to defend his case in light of the extraordinary circumstances caused by Mr. Gibson's negligence.

Respectfully submitted,

BURNS, WHITE & HICKTON, LLC

BY: David J. Hickton/AZR
David J. Hickton, Esquire
PA I.D. No. 34524
Ira L. Podheiser, Esquire
PA I.D. No. 46973
Amanda Z. Rubio, Esquire
PA I.D. No. 203414
Counsel for Defendant John Herklotz

CERTIFICATE OF SERVICE

I, David J. Hickton, Esquire, hereby certify that a true and correct copy of **Brief in Support of Defendant John Herklotz's Motion for Reconsideration or Relief from Judgment** was delivered via first-class mail, postage prepaid on the 6th day of May, 2008, to the following:

James R. Walker, Esquire
Manion McDonough & Lucas, P.C.
600 Grant Street, Suite 1414
Pittsburgh, PA 15219

John W. Gibson, Esquire
Greenfield Court
1025 Fifth Avenue
Pittsburgh, PA 15219

Thomas E. Reilly, Esq.
2025 Greentree Road
Pittsburgh, PA 15220

BURNS, WHITE & HICKTON

BY: David J. Hickton /AZR
David J. Hickton, Esq.
PA. ID 34524
Counsel for Defendant John Herklotz